Public Prosecutor v Tukiman bin Demin

HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO MT(3)45–69 OF 2002
ZAWAWI SALLEH JC
12 MAY 2008

Criminal Law — Dangerous drugs — Trafficking — Appeal by prosecution against acquittal of accused — Whether prosecution had established prima facie case — Whether accused had exclusive possession over drugs — Whether accused had care and management of room where drugs were found

Criminal Law — Dangerous Drugs Act (Malaysia) — s 37 — Drug trafficking — Whether prosecution can invoke presumption under s 37(b) — Whether accused occupier of room — Whether accused had exclusive occupation or exclusive use and care or management of room — Evidence of free access by others to accused's room

Evidence — Witness — Interested witness — Whether evidence should be accepted — Probative value of evidence — Evidence Act 1950 s 32(1)(i), (j)

Evidence — Witness — Statement by — Witness not called as unable to be located — Probative value of evidence — Evidence Act 1950 s 32(1)(i), (j)

On 24 October 2001, at about 9.30am, acting upon information received about drug trafficking activities, a party of police personnel conducted a raid on a house at 21, Jalan Besar, Kg Baru Plentong, Masai, Johor. On reaching the house the raiding team divided into two groups and took up positions at the front and back of the house. When nobody answered or opened the front door the police entered by using the back door of the house. In the house the police saw three Malay men to whom an officer identified themselves as the police. During a search in one of the bedrooms that was later discovered to be the bedroom of Tukiman bin Demin (the accused), the police recovered a plastic packet containing substances suspected to be cannabis on top of the television table and another slab of dried leaves suspected to be cannabis on the floor. Two bank account books belonging to the accused were also recovered from the same bedroom. The accused and his two friends together with the items recovered were thereafter brought to the police station and handed over to the investigation officer. The substances recovered were later

positively confirmed by the chemist to contain 576.22 g cannabis. In addition, cannabis was also found in another room in the house occupied by the accused. The occupier of this room, one Samiun bin Mohd Dah (the co-occupier), was charged under s 39(A) of the Dangerous Drugs Act 1952 ('DDA') and convicted. Based on the evidence, the accused was charged for trafficking in 576.22g cannabis, under s 39B(1)(a) of the DDA. At the close of the prosecution case the judge held that the prosecution had not made out a prima facie case against the accused and accordingly acquitted and discharged the accused without calling upon him to enter his defence. The trial judge had concluded that the prosecution had failed to prove that the accused had exclusive possession of the offending drugs because, inter alia, the prosecution did not present any evidence affirmatively linking the accused with the drugs other than the presence of the drugs in his room. This is the prosecution's appeal against that decision. It was the prosecution's contention that it had proven that the accused had exclusive possession of the drugs by showing that the drugs were not concealed but 'in plain view' of the accused in his room; the room where the drugs were found was, as admitted by the accused, his room; the two others who were arrested together with the accused gave evidence that the drugs did not belong to them. The accused maintained that the element of exclusive possession had not been proven by the prosecution because, inter alia, his fingerprints were not found on the plastic packets containing cannabis that were recovered by the police; the accused's room could not be locked and so anyone in the house had free access to it; and the two others who had been arrested with the accused gave evidence that they had often visited the premises and that the accused's room which had a television was always the favourite spot for visitors. In addition, the prosecution sought to admit the statement of the co-occupier under s 32(1)(j) of the Evidence Act 1950 ('the Act') because it was unable to call the co-occupier and make him available in court. This deprived the accused of the opportunity to ask him questions relating to the offending drugs. Based on the evidence adduced, it would appear that this appeal concerned three issues to be determined, namely whether the accused had exclusive possession over the drugs; whether the prosecution could invoke the presumption under s 37(b) of the DDA; and whether the statement by the co-occupier was admissible in evidence under s 32(1)(i) and (j) of the Act.

Held, dismissing the appeal:

(1) In the context of drug possession, 'exclusive possession' could be construed to mean that the place where the drugs were found must be exclusive to the accused. However, possession of the drugs need not be exclusive. This meant that possession may be joint, that is, two or more persons may jointly have possession of the contraband. From the plethora of cases decided by the courts, it was clear that in order to

establish exclusive possession, there was a burden of proof on the prosecution to prove exclusivity of custody and control of the drugs by the accused. Therefore, for possession to be established, accessibility by others to the place where the drugs were found must be excluded. A failure by the prosecution to establish this would result in an acquittal of the accused. In the instant case, the drugs were not found on the accused but in the room to which several persons have equal access. Moreover, the presence of the two others, the co-occupier and other bachelors in the house, raised some doubts as to whether it could be said affirmatively that the drugs were in the possession of the accused or either one of them or all of them were in joint possession of the said drugs. In addition, there was no evidence of additional incriminating circumstances implicating the accused such as fingerprints, incriminating statements, efforts to avoid arrest, or the drugs being concealed in any portion of the room. The only evidence available to the prosecution was the discovery of the cannabis in the accused's room and this by itself is incapable of establishing, linking or demonstrating a nexus between the accused and the cannabis (see paras 14,17 & 21.4).

(2) It was not necessary for the occupier to be the owner of the premises, in that he may be a tenant or a mere licensee. The necessary requirement was that the occupier had or appeared to have the care and management of such premises at the time of the commission of an offence. As such, the mere presence of the accused in the premises or any part thereof did not amount to having care or management. In this case the prosecution had tendered the accused's personal belongings and called the owner of the house to give evidence that the accused was a tenant of the house, in order to establish that the accused was an occupier within the meaning of s 37(b) of the DDA. However, there was nothing to show that other persons had no access to the accused's room. In fact there was evidence that others in the house and visitors could enter and leave the accused's room freely. As such, it was concluded that the accused had no care and management of the room to trigger the presumption under s 37(b) of the DDA(see paras 23–24)

(3) As a rule, the prosecution had the onus of calling all necessary witnesses to unfold the narrative of their case. However, the prosecution failed to call the co-occupier as a witness but instead admitted a statement made by this witness under s 32(1)(i) and (j) of the Act. This created a gap in the prosecution's case. Although the statement was admitted as evidence, the weight or probative value of such evidence was minimal because there was no opportunity to cross-examine the maker of this statement and the person making the statement was an interested witness being a co-occupier of the house and having been charged and convicted of an offence under s39A(2) of the DDA (see paras 25 and 29).

[Bahasa Malaysia summary

Pada 24 Oktober 2001, kira-kira 9.30 pagi, bertindak berdasarkan maklumat berkenaan dengan aktiviti pengedaran dadah, sepasukan pegawai polis telah mengadakan satu serbuan ke atas sebuah rumah di 21, Jalan Besar, Kg Baru Plentong, Masai, Johor. Setibanya di rumah tersebut, pasukan serbuan telah dibahagikan kepada dua kumpulan dan mengambil tempat di bahagian hadapan dan belakang rumah. Apabila tiada sesiapa yang menjawab atau membuka pintu hadapan, polis telah masuk menggunakan pintu belakang rumah tersebut. Di dalam rumah tersebut, pihak polis telah melihat tiga lelaki Melayu dan seorang pegawai memperkenalkan diri mereka sebagai pegawai polis. Semasa pemeriksaan di salah satu daripada bilik-bilik tidur, kemudiannya diketahui bahawa bilik tidur tersebut adalah bilik Tukiman bin Demin (tertuduh), pihak polis telah menemui satu paket plastik yang mengandungi bahan yang disyaki sebagai kanabis di atas meja televisyen dan kepingan daun kering yang disyaki sebagai kanabis di atas lantai. Dua akaun bank milik tertuduh juga ditemui di dalam bilik tidur yang sama. Tertuduh dan dua orang rakannya bersama-sama dengan barangan yang ditemui kemudiannya dibawa ke balai polis dan diserahkan kepada pegawai penyiasat. Bahan yang ditemui kemudiannya disahkan positif oleh ahli kimia mengandungi 576.22g kanabis. Selanjutnya, kanabis juga ditemui di dalam bilik yang lain dalam rumah yang dihuni oleh tertuduh. Penghuni bilik tersebut, seorang yang bernama Saimun bin Mohd Dah (penghuni bersama), telah didakwa di bawah s 39(A) Akta Dadah Berbahaya 1952 ('ADB') dan telah disabitkan. Berdasarkan bukti, tertuduh telah didakwa mengedar 576.22g kanabis di bawah s 39B(1)(a) ADB. Di akhir kes pendakwaan, hakim memutuskan bahawa pihak pendakwaan tidak berjaya membuktikan kes prima facie terhadap tertuduh dan oleh itu melepaskan dan membebaskan tertuduh tanpa memanggilnya untuk memasukkan pembelaan. Hakim bicara telah menyimpulkan bahawa pihak pendakwaan telah gagal untuk membuktikan bahawa tertuduh mempunyai milikan eksklusif terhadap dadah berbahaya, kerana antara lain, pendakwaan tidak mengemukakan apa-apa bukti yang mengaitkan tertuduh dengan dadah selain daripada kewujudan dadah di dalam biliknya. Ini adalah rayuan pihak pendakwaan terhadap keputusan tersebut. Pihak pendakwaan menegaskan bahawa ianya telah dibuktikan bahawa tertuduh mempunyai milikan eksklusif dadah tersebut dengan menunjukkan bahawa dadah tersebut tidak disorokkan tetapi 'di dalam pandangan jelas' tertuduh di dalam biliknya; bilik di mana dadah ditemui adalah diakui oleh tertuduh sebagai biliknya; dua orang lain yang telah ditangkap bersama dengan tertuduh telah memberikan keterangan bahawa dadah tersebut bukan milik mereka. Tertuduh telah tetap mengekalkan bahawa elemen milikan eksklusif tidak dibuktikan oleh pihak pendakwaan kerana, antara lain, cap jarinya tidak ditemui di paket plastik mengandungi kanabis yang ditemui oleh pihak polis; bilik tertuduh tidak

boleh dikunci dan sesiapa sahaja di dalam rumah mempunyai akses yang bebas terhadapnya; dan dua orang lain yang telah ditangkap dengan tertuduh memberikan keterangan bahawa mereka sering melawat premis tersebut dan bilik tertuduh yang mempunyai televisyen selalu menjadi tempat kegemaran pelawat. Tambahan pula pihak pendakwaan cuba untuk menerima kenyataan penghuni bersama di bawah s 32(1)(j) Akta Keterangan 1950 ('Akta tersebut') kerana tidak dapat memanggil penghuni bersama dan membuatkannya hadir di mahkamah. Ini telah menghalang peluang tertuduh untuk menyoalnya berkaitan dengan dadah berbahaya. Berdasarkan kepada keterangan yang dikemukakan, adalah kelihatan rayuan ini berkenaan dengan tiga isu untuk dipertimbangkan, iaitu sama ada tertuduh mempunyai milikan eksklusif terhadap dadah tersebut; sama ada pihak pendakwaan boleh menggunakan anggapan di bawah s 37(b) ADB; dan sama ada kenyataan oleh penghuni bersama diterima dalam keterangan di bawah s 32(1)(i) dan (j) Akta.

Diputuskan, menolak rayuan:

(1) Dalam konteks pemilikan dadah, 'milikan eksklusif' boleh ditafsirkan sebagai bermaksud tempat di mana dadah dijumpai mestilah eksklusif pada tertuduh. Tetapi, milikan dadah tidak perlu eksklusif. Ini bermakna milikan mungkin milikan bersama, iaitu, dua orang atau lebih mungkin bersama-sama memiliki kontraban tersebut. Daripada banyaknya kes-kes yang diputuskan oleh mahkamah, adalah jelas bahawa untuk membuktikan milikan eksklusif, adalah beban pembuktian ke atas pihak pendakwaan untuk membuktikan jagaan dan kawalan yang eksklusif dadah tersebut oleh tertuduh. Oleh itu, untuk membuktikan milikan, akses oleh orang lain ke tempat dadah ditemui mestilah dikecualikan. Kegagalan oleh pihak pendakwaan untuk membuktikan perkara ini akan menyebabkan pembebasan tertuduh. Dalam kes ini, dadah tidak ditemui pada tertuduh tetapi di dalam bilik yang mana beberapa orang mempunyai akses yang sama. Tambahan pula, kehadiran dua orang lain, penghuni bersama dan orang bujang lain di dalam rumah, membangkitkan kesangsian berkenaan dengan sama ada ianya boleh dikatakan secara sahnya bahawa dadah tersebut adalah di dalam milikan tertuduh atau salah seorang daripada mereka atau kesemua mereka mempunyai milikan bersama dadah tersebut. Selanjutnya, tiada keterangan tambahan yang menunjukkan keadaan bersalah yang membabitkan tertuduh seperti cap jari, kenyataan bersalah, usaha untuk mengelakkan tangkapan, atau dadah yang disorok di mana-mana bahagian bilik tersebut. Keterangan yang ada pada pihak pendakwaan hanya penemuan kanabis di dalam bilik tertuduh dan ini sahaja tidak mencukupi untuk membuktikan,

mengaitkan atau menunjukkan hubungan di antara tertuduh dangan kanabis tersebut (lihat perenggan 14, 17 & 21).

(2) Tidak perlu bagi penghuni menjadi pemilik premis tersebut, iaitu beliau boleh menjadi penyewa atau pemilik lesen. Keperluan penting adalah penghuni mempunyai atau kelihatan mempunyai jagaan dan pengurusan premis tersebut ketika berlakunya kesalahan tersebut. Oleh itu, dengan hanya kehadiran tertuduh di dalam premis atau mana-mana bahagian daripadanya tidak menjadikan adanya jagaan atau pengurusan. Dalam kes ini pihak pendakwaan telah mengemukakan barangan peribadi tertuduh dan telah memanggil pemilik rumah untuk memberikan keterangan bahawa tertuduh adalah penyewa rumah tersebut bagi membuktikan bahawa tertuduh adalah penghuni menurut tafsiran s 37(b) ADB. Tetapi tidak ada apa-apa yang menunjukkan bahawa orang lain tidak mempunyai akses terhadap bilik tertuduh. Tambahan pula terdapatnya keterangan bahawa orang lain di dalam rumah dan pelawat boleh masuk dan keluar bilik tertuduh secara bebas. Oleh itu, adalah disimpulkan bahawa tertuduh tidak mempunyai jagaan dan pengurusan bilik tersebut untuk mencetuskan anggapan di bawah s 37(b) ADB (lihat perenggan 23–24).

(3) Sebagai peraturan, pihak pendakwaan mempunyai tanggungjawab untuk memanggil kesemua saksi penting untuk membuktikan kes mereka. Tetapi pihak pendakwaan telah gagal untuk memanggil penghuni bersama sebagai saksi tetapi sebaliknya menerima kenyataan yang telah dibuat oleh saksi ini di bawah s 32(1)(i) dan (j) Akta tersebut. Ini menyebabkan jurang di dalam kes pendakwaan. Walaupun kenyataan telah diterima sebagai keterangan, berat atau nilai keterangan tersebut adalah minimum kerana tidak terdapatnya peluang untuk memeriksa balas pembuat kenyataan dan orang yang membuat kenyataan adalah saksi berkepentingan yang menjadi penghuni bersama rumah tersebut dan telah didakwa dan disabitkan kesalahan di bawah s 39A(2) ADB (lihat perenggan 25 & 29).]

Notes

For a case on s 37 of the Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 185.

For cases on interested witness, see 7(2) *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2768–2790.

For a case on statement by witness, see 7(2) *Mallal's Digest* (4th Ed, 2005 Reissue) para 2825.

For cases on trafficking dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301 (refd)
Choo Yoke Choy v PP [1992] 2 MLJ 632 (refd)
Idris v PP [1960] 1 MLJ 296 (refd)
Lee Chee Meng v PP [1992] 1 MLJ 322 (refd)
Leow Nghee Lim v Reg [1956] 22 MLJ 28 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137 (refd)
PP v Abdullah Zawawi bin Yusof [1993] 3 MLJ 1 (refd)
PP v Aris bin Yunus [1989] 1 CLJ 239 (refd)
PP v Basri bin Salihin [1994] 2 MLJ 476 (refd)
PP v Chan Peng Fatt [2000] 1 MLJ 179 (refd)
PP v Chong Wei Kian [1990] 3 MLJ 165 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1 (refd)
PP v Hanif Basree Abdul Rahman [2008] 3 MLJ 161 (refd)
PP v Lai Ah Bee [1974] 2 MLJ 74 (refd)
PP v Md Alim bin Samad [1998] 1 MLJ 260 (refd)
PP v Muhammad Nasir bin Shaharuddin [1994] 2 MLJ 576 (refd)
PP v Mohd Jamil bin Yahya & Anor [1993] 3 MLJ 702 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576 (refd)
PP v Muhamed Kasim bin Yatim [1977] 1 MLJ 64 (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678 (refd)
PP v Tan Ah Ling [1990] 2 CLJ 83 (refd)
Sim Tiew Bee v PP [1973] 2 MLJ 200 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (refd)

Legislation referred to

Criminal Procedure Code ss 112, 180(1)
Dangerous Drug Acts 1952 ss 37(b), 39(A), 39(A)(2), 39B(1)(a), 39B(2)
Evidence Act 1950 ss 32, 32(1)(i), 32(1j(j), 114(g)

Shahrizal Shaari (Deputy Public Prosecutor Attorney General's Chambers) for the prosecution.
Zahar Ngah (Zahar & Partners) for the accused.

Mohd Zawawi JC:

BACKGROUND

[1] Tukiman bin Demin ('the accused'), was charged for trafficking in 576.22 g cannabis, an offence under s 39B(1)(a) of the Dangerous Drug Acts 1952 ('the Act') and punishable under s 39B(2) of the same Act.

[2] The accused claimed trial to the charge.

[3] The prosecution called 11 witnesses to support its case. They are Sjn Mohd Yatim bin Maarof (SP1), L/Kpl Jagit Singh (SP2), L/Kpl Mohammad Bassimi bin Sani (SP3), Abul Hasan a/l Ghafoor Khan (SP4),C/I Zambri bin Razab (SP5), Saupy bin Daud (SP6), Zamri bin Rahan (SP7), D/Sjn Mohd Isa bin Jalil (SP8), C/I Jafri bin Muhammad (SP9), Azrul bin Ibrahim (SP10), C/I Mohd Hadzir bin Che Pa (SP11).

[4] At the end of the prosecution's case, the court had acquitted and discharged the accused without calling upon him to enter his defence.

[5] The prosecution now files an appeal against the whole of the said decision.

THE CHARGE

[6] The charge in Bahasa Malaysia was in the following terms:

> Bahawa kamu pada 24 Oktober 2001, jam lebih kurang 11 pagi, di rumah No 21, Jalan Besar, Kampung Baru Plentong Tengah, Masai, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah didapati mengedar dadah berbahaya iaitu sejumlah 576.22 g cannabis dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

THE PROSECUTION'S CASE

[7] The salient facts adduced by the prosecution can be summarised as follows:

7.1 On 24 October 2001, at about 9.30am, SP5 (C/I Zamri bin Razab) had received an information about drug trafficking activities at a house No 21 Jalan Besar, Kg Baru Plentong Tengah, Masai, Johor.

7.2 SP5 led a party of police personnel comprising of 6 members to the scene of crime and reached there at about 11am.

7.3 On reaching the house, the raiding teams were divided into two groups. SP5 together with the other three police personnel took up position at the front of the house. The second group, on the other hand, guarded the back of the house.

7.4 SP5 knocked on the front door of the house but nobody opened the door. From the windows, SP5 saw several men running towards the back of the house.

7.5 SP5 then entered the house by using the back door of the house which was slightly opened. Upon entering the house, he saw three Malay men and he identified himself as a police officer.

7.6 During a search in one of the bedrooms, SP5 recovered a plastic packet containing substances suspected to be cannabis on the top of the television's table. SP5 also recovered a slab of dried leaves suspected to be cannabis on the floor. Two bank's account books (exh P18 and exh P19) belong to Tukiman bin Demin (the accused) were also recovered from the bedroom.

7.7 The accused and his two friends, together with the items recovered, were brought to the police station. Then, they were handed over to the investigation officer, SP9 (C/I Jafri bin Muhamad).

7.8 These substances were later positively confirmed by the chemist to contain 576.22g cannabis, (see chemist report in P17).

7.9 The two men that were arrested with the accused had been released on the instruction of the deputy public prosecutor. Later, they testified on behalf of the prosecution (SP7 and SP10).

BURDEN ON THE PROSECUTION

[8] It is the duty of the prosecution at the close of its case to prove a prima facie case against the accused as provided under s 180(1) of the Criminal Procedure Code. The steps that should be taken by trial court at the close of the prosecution's case had been set out in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 and *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1. I had subjected the prosecution evidence to maximum evaluation and asked myself this question: 'If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative, then no prima facie had been made out and the accused would be entitled to an acquittal'.

EVALUATION OF EVIDENCE BY THE COURT

[9] Based on the evidence adduced, there are three issues to be determined, namely:

(a) Whether the accused had exclusive possession over the drugs;

(b) Whether the prosecution can invoke the presumption under s 37(b) of the DDA 1952; and

(c) Whether the statement made by Samiun bin Mohd Dah under s 112 of the Criminal Procedure Code was admissible in evidence by reason of s 32(1)(i) and (j) of the Evidence Act 1950.

[10] Each issue is considered in greater detail below.

Isu (a)

[11] Encik Zahar bin Ngah, the learned defence counsel, in his submission argued that the element of exclusive possession had not been proven by the prosecution. He invited the court's attention to the following facts:

(a) The accused's fingerprint was not found on the two plastic packets containing substances suspected to be cannabis;

(b) The room where the drugs were found cannot be locked;

(c) The accused was arrested together with his two friends (SP7 and SP10) who had spent the night at the house;

(d) SP7 and SP10 gave evidence that they frequently come to that house. According to them, the accused's room will be the favourite spot because there is a television set in the room. SP7 gave evidence that he slept in the accused's room on the night of the raid; and

(e) Similar drugs (cannabis) were also found in the other room of the house. The occupier of the room, Samiun bin Mohd Dah, was charged under s 39(A) of the DDA 1952 and was convicted with the offence. However, he was not called to give evidence in court and this failure had deprived the defence to ask him questions relating to the offending drugs.

[12] On the contrary, the learned deputy public prosecutor, Encik Shahrizal bin Shaari, submitted that the prosecution had proved that the accused had the exclusive possession of the offending drugs based on the following facts:

(a) The drugs were not concealed in the room; it was 'in plain view' of the accused;

(b) The accused admitted to SP5 that the room where the drugs were found was his;

(c) SP7 and SP10 gave evidences that the drugs were not belong to them; and

(d) Several documents (exhs P18, P19, P20, P21, P22 and P23) belong to the accused were found in the said room.

EXCLUSIVE POSSESSION

[13] The term 'exclusive possession' is no where to be found in the Act. In understanding the concept of 'exclusive possession'; I think it is appropriate to ascertain the meaning of 'exclusive'. The court first look at the dictionary definition of 'exclusive'. There are various definitions of 'exclusive' according to dictionaries:

Webster's 1913 Dictionary

Having the power of preventing entrance; debarring from participation or enjoyment; possessed and enjoyed to the exclusion of others;

Merriam-Website On Line

(1a) excluding or having power to exclude; b: limiting or limited to possession, control, or use by a single individual or group.

(2a) excluding others from participation

Your Dictionary.Com

(1) excluding or tending to exclude all others; shutting out other considerations, happenings, existence, etc: an exclusive interest in sport.

(2) excluding all but what is specified 'only' is an exclusive particle.

(3) given or belonging to no other; not shared or divided, sole on exclusive right to sell something.

Dictionary.Com

(1) 'exclusivity' is defined as follow: not admitting of something else, incompatible: mutually exclusive plans of action.

(2) omitting from consideration or account (often fol. by of): a profit of ten percent, exclusive of taxes.

(3) limited to the object or objects designated: exclusive attention to business.

(4) shutting out all others from a part of share: an exclusive right to film the novel.

[14] Thus, to sum up, the common usage, plain, natural and ordinary meaning of 'exclusive' is 'excluding or to exclude all others; not shared or divided'. In the context of drug possession, 'exclusive possession' can be

construed to mean that the place where the drugs are found must be exclusive to the accused. However, possession of the drugs need not be exclusive. Possession may be joint, that is, two or more persons may jointly have possession of the contraband, exercising custody and control over it. In that case, each of these persons is considered to be in possession of that contraband (see *Leow Nghee Lim v Reg* [1956] MLJ 28). In the present case, the issue of joint possession does not arise.

[15] The concept of 'exclusive possession' flows from judicial interpretation of the Act. A judicial decision construing the word of a statute does not constitute the creation of a new legal principle. The construction of a statute, rather, the exercise of determining the intent of the legislature when the Act was passed. The courts sought to find the intent of the legislature and to apply it to the facts of the case.

[16] There is a plethora of cases decided by the courts on this point. The principle as discernible from those cases is simply these: there is a burden of proof on the prosecution to exclude the possibility of access by others to the place where the drugs are found. A failure by the prosecution to establish this would result in an acquittal of the accused; for example:

(i) *Public Prosecutor v Chan Peng Fatt* [2000] 1 MLJ 179. The court found that the accused did not have exclusivity to the attic where the drugs were found; therefore he was acquitted and discharged.

(ii) *Public Prosecutor v Md Alim bin Samad* [1998] 1 MLJ 260. The rooms where the drugs were found were accessible by different people frequenting the house. The court held that knowledge alone not enough to establish control.

(iii) *Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 322. There were access by third parties to the premises, thus exclusivity of use of the premises had not been proved and the accused was acquitted.

(iv) *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137. The accused was acquitted even though the drugs were found in his room, but, as he shared the room with several others, the prosecution had not proved exclusive use of the room or exclusive custody or control of the drugs.

(v) *Public Prosecutor v Basri bin Salihin* [1994] 2 MLJ 476. The bin where the drugs were found was accessible to the general public and the accused had no exclusive control over it. Therefore, the accused was acquitted and discharged.

[17] In three celebrated cases of *Public Prosecutor v Abdullah Zawawi bin Yusof* [1993] 3 MLJ 1, *Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632 and *Public Prosecutor v Muhammad Nasir bin Shaharuddin* [1994] 2 MLJ

576, the court emphasised that the exclusivity of custody and control of the drugs by the accused must be established by the prosecution. Therefore, for possession to be established, accessibility by others to the place where the drugs are found must be excluded.

[18] In the first case, the drugs were found in the appellant's tool box in a locked cupboard, the keys of which were with the appellant's wife, in the appellant's house which was still under construction. The appellant's wife was jointly charged but was acquitted at the end of the prosecution's case. Edgar Joseph Jr SCJ said:

> Given the fact that this was a case where the police were acting on a tip-off, the onus was not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility.

He adds further:

> This question must be answered in favour of the appellant considering that there was more than one way in which the evidence adduced by the prosecution might be viewed. The evidence indeed could have been regarded as implicating the appellant or the wife or both of them or the informer or even the other man living in the house.

[19] In the second case, the drugs were found in a room occupied by the accused and his wife as well as from the common kitchen of the same house which was accessible to all the occupants of the house. Only the accused was charged. The Supreme Court held that the prosecution had to establish beyond reasonable doubt that the appellant alone had possession of the drugs or that both he and his wife had joint possession of the drugs. Here, the prosecution had not shown that the accused had sole possession or joint possession of the drug, ie, a common intention to possess. Doubt existed as there were two people in the room and there was no evidence of common intention and further, there was access by others to the kitchen.

[20] In the third case, it was held that generally, if exclusive occupation of premises cannot be established, especially where other persons also had access to the premises, it cannot be said that the occupier had custody and control over everything found in the premises. Furthermore, where two or more persons were found in a place where an offence had been committed, and if the evidence did not clearly point to one or the other, the guilt of neither had been established.

[21] Now, reverting back to the present case, the court concluded that the prosecution had failed to prove that the accused had the exclusive possession

of the offending drugs on the following reasons:

21.1 At the outset, it should be observed that the prosecution did not present one scintilla of evidence affirmatively linking the accused with the drugs other than the presence of the drugs in his room. Of course, a conviction for possession of dangerous drugs may be predicated on circumstantial evidence. It is a settled law that the drugs need not be found on the person of the accused, as long as it is found in a place under his custody or control. However, where the prosecution relies on wholly circumstantial evidence to prove possession of dangerous drugs, the circumstances shown, must, as in all other criminal cases, exclude every other reasonable hypothesis that of guilt; and proof amounting only to strong suspicion or a mere probability of guilt is insufficient to sustain a conviction, (see *Idris v Public Prosecutor* [1960] 1 MLJ 296 and *Public Prosecutor v Hanif Basree Abdul Rahman* [2008] 3 MLJ 161). The mere presence of controlled substance in the accused's room, as in the present case, without more, would be insufficient to sustain a conviction when possession of the premise is non-exclusive. The accused's custody or control over the offending drugs which were found in his room may be inferred if there are additional circumstances tending to buttress such an inference. These additional circumstances include: (1) incriminating statements by the accused; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) personal items owned by the accused mingle with the drugs, etc. Simply finding drugs in a portion of the room accessible equally to other occupants and visitors, without more, would be insufficient to sustain conviction. The evidence must show that the accused had exclusive access, use or possession of the room where the contraband is found.

21.2 Applying the considerations set out above, the evidence in this case was undisputed that the accused was not alone when he was arrested. SP 7 and SP10 were there too and both of them had spent the night at that house on the night of the raid. Samiun bin Mohd Dah, the occupier of the second room, was also in the house. It was evident that the door of the room cannot be locked and anybody in the house had access to the said room. SP7 and SP10, in their evidence as the prosecution's witnesses, denied that the said drugs belonged to them. However, they did not say that the drugs belonged to the accused either.

21.3 It was submitted by the learned deputy public prosecutor, the facts that the drugs were found in the accused's room; the drugs were in plain view of the accused and also the conduct of the accused in admitting that the room where the drugs were found was his, cumulatively showed that the accused had knowledge and custody/control of the offending drugs. With respect, this court disagrees. Mere knowledge by itself does not amount to possession. Even the prosecution succeeds in establishing

knowledge, they must also take a step further and establish control or custody of the drugs, (see *Public Prosecutor v Muhammad Nasir bin Shaharuddin* [1994] 2 MLJ 576). To prove possession, the knowledge of the presence of the drug and the custody/control over the substance must be proved by evidence of equivalent effects. In this regard, the prosecution cited very few facts to enable the court to push mere speculation and to give rise to a reasonable inference of possession.

21.4 The drugs were not found on the accused but in the room to which several person have equal access. The presence of SP7, SP10 and Samiun bin Mohd Dah and other bachelors ('budak-budak bujang') in the house, raise some doubts as to whether it could be said affirmatively that the drugs were in the possession of the accused or either one of them or all of them are in joint possession of the said drugs. Where possession is not clear, as in the present case, when the offending drugs may be attributed to more than one individual, possession requires some nexus, link, or other connection between the accused and the offending drugs. In this case, there is no evidence of additional incriminating circumstances implicating the accused such as finger prints, incriminating statements, efforts to avoid arrest or the offending drugs were concealed in any portion of the room. The bare-bones of the prosecution case is the contraband was found in the accused's room. Under the circumstances, the prosecution's case is barren of establishing linking or demonstrating a nexus between the accused and the offending drugs.

Issue (b)

[22] The accused is not an occupier of the room within the meaning of s 37(b) of the Act. To be an occupier of the room or premises, the accused must have exclusive occupation or exclusive use and care or management of the room or premises where the offending exhibit is found (see *Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 322; *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678; *Public Prosecutor v Aris bin Yunus* [1989] 1 CLJ 239).

[23] It is admitted that it is not necessary for the occupier to be the owner of the premise. He may be a tenant or a mere licensee. The necessary requirement is that the occupier has or appears to have the care and management of such premise at the time of the commission of an offence. Mere presence of the accused in the premises or any part thereof does not amount to having care or management (see *Public Prosecutor v Lai Ah Bee* [1974] 2 MLJ 74). In *Public Prosecutor v Tan Ah Ling* [1990] 2 CLJ 83, the court held that although the electricity and telephone bills were in the name of the accused, they did not afford sufficient grounds for the operation of the aforesaid presumption as there was no evidence adduced to indicate that it

was not the wife or the accused 'who had care and management of the house or control of the incriminating items so that either the one or the other could have been the occupier of the premises'. In *Public Prosecutor v Chong Wei Kian* [1990] 3 MLJ 165, the evidence was adduced that at the time of arrest, the accused had with him the keys to the room in which the drugs were found and in the said room the police recovered a passport and a bank book belonging to him, yet the court was of the view that it was insufficient to trigger the presumption.

[24] The prosecution had tendered the accused's personal belongings (exhs P18, P19, P20, P21, P22 and P23) to trigger the presumption that the accused was the occupier of the room. The prosecution also called SP4, the owner of the house, to give evidence that the said house was rent out to the accused. However, there was nothing to show that other person has no access to the said room. In fact, there was evidence that other people inside the house and visitors can enter and leave the said room freely. As such, the court concluded that the accused had no care and management of the room to trigger the presumption under s 37(b) of the Act.

Issue (c)

[25] The rule in *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 requires the prosecution to call all necessary witnesses to unfold the narrative of their case. Concerning the failure on the part of the prosecution to call Samiun bin Mohd Dah and make him available in court, the prosecution submitted that all efforts had been taken to trace him but the attempts are fruitless. Therefore, the prosecution sought that the statement made by this witness under s 112 of the CPC be admitted pursuant to the provision under s 32(1)(i) and (j) of the Evidence Act 1950.

[26] In *Sim Tiew Bee v Public Prosecutor* [1973] 2 MLJ 200, the court held that before the court could admit the statement of a witness as evidence under s 32, the condition precedent contemplated under the section must be satisfied. The prosecution has to satisfy the court that the witness cannot be found or that his attendance cannot be procured without an amount of delay or expense.

[27] In *Public Prosecutor v Muhamed Kasim bin Yatim* [1977] 1 MLJ 64, it was held that the presumption under s 114(g) of the Evience Act 1950 would not arise where the prosecution had made sufficient attempts to trace the important witness. In the present case, SP11 had made several attempts to trace Samiun bin Mohd Dah by:

(a) tracing the latest address from National Registration Department (exh P26) and Election Commission's office. SP11 went to the said address but was told by the tenant that he did not know about Samiun's whereabouts; and

(b) through advertisements in *Harian Metro*, dated 14 July 2007 (exh P25) and *Berita Harian* dated 24 November 2007 (exh P27).

[28] Viewing the evidence on this aspect in the light most favourable to the prosecution and in the absence of objection by the learned defence counsel, this court was satisfied that the condition precedent contemplated under the section has been satisfied. As a result, the statement was admitted and marked as exh P24. Although exh P24 was admitted as evidence, a statement made under s 32(1)(i) and (j) of the Evidence 1950 must be examined with the greatest caution especially in this present case where the accused facing a charge carrying a mandatory sentence of death. The weight or probative value of exh P24 is very minimal ('minimal weight') in evidence because of these reasons:

(a) Exhibit P24 is not subject to cross-examination by the defence;

(b) This witness is not an uninterested witness because he was the occupier of the second room in the house where the drugs were found. Furthermore, certain amount of drugs of similar nature were also found in his room and he was charge and convicted for an offence under s 39A(2) of the DDA; and

(c) In P24, this witness stated that 'saya tidak terlibat dengan dadah'. The statement of the witness on this aspect does not inspire confidence bearing in mind the fact that he was charged under s 39(A)(2) of the DDA 1952 and was convicted with the offence for the drugs found in the other rooms of the house.

[29] Concerning the weight to be given to exh P24, this court agreed with the observation made by KC Vohrah J (as he then was) in *Public Prosecutor v Mohd Jamil bin Yahya & Anor* [1993] 3 MLJ 702 when he said (at p 710):

> In my view the weight and degree of credit to be attached to a statement by a declarant under para (i) who is patently not disinterested must be examined with the greatest of caution lest false stories or a false colouring to the stories given by the declarant in the statement makes the court draw a jaundiced view of facts which cannot be verified through the cross-examination of the declarant and facts which may falsely implicate an accused. And more so where an accused faces a charge carrying mandatory sentence death on conviction on the charge.

[30] Based on the above reasons, the failure on the part of the prosecution to call Samiun bin Mohd Dah to give evidence in court created a gap in the prosecution case. In circumstances of the case, Samiun bin Mohd Dah might had access to the room and in possession of the said drugs.

[31] On maximum evaluation of the evidence presented by the prosecution, this court found that the prosecution had failed to prove prima facie case against the accused. In the circumstances, the accused was acquitted and discharged without calling him to enter his defence.

Appeal dismissed.

Reported by K Nesan